**International Brotherhood of Electrical Workers, Local 617 (Greyhound Exposition Services, Inc.) *and* Louis E. Davoli.** Case 20–CB–8524

October 22, 1992

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On April 7, 1992, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Charging Party filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

## ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We note that the judge did not discuss Charging Party Davoli's testimony that on May 18, 1990, he was present when the Respondent's dispatcher (Dean) played back the tape on the telephone answering machine, and that Davoli heard a voice say ''I'm reconfirming my call for the show from the night before.'' Davoli claims that the Respondent violated the Act by failing and refusing to refer him for employment to this job. Dean's testimony, which acknowledges Davoli's presence, was that this was not a request that came in for that day, but a request from several days earlier, which had already been filled. The judge credited Dean's explanation for the message overheard by Davoli, thereby indicating that the judge sub silencio considered and rejected Davoli's testimony to the extent that it was in conflict with Dean's explanation.

*Mary Vail* and *Leticia Pena*, for the General Counsel.
*Joseph Hogan*, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding, in which a hearing was held on January 30, 1992, is based on an unfair labor practice charge filed on November 9, 1990, and an amended charge filed on January 4, 1991, by Louis E. Davoli (Davoli), and on a complaint issued on December 31, 1990, on behalf of the General Counsel of the National Labor Relations Board (Board), by the Board's Regional Director for Region 20, alleging, as amended at the hearing, that the International Brotherhood of Electrical Workers, Local 617 (Respondent) has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the National Labor Relations Act (Act).

The complaint alleges that the Respondent is the sole and exclusive source of referrals of employees who perform certain work for Greyhound Exposition Services, Inc. (Employer), and that, in violation of Section 8(b)(1)(A) and (2) of the Act, on May 18, 1990, Respondent failed and refused to refer employees, including Davoli, to the Employer and engaged in this conduct ''for arbitrary and capricious reasons and for reasons other than the employees' failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership in Respondent.'' Respondent filed an answer denying the commission of the alleged unfair labor practices.[1]

On the entire record, and from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

### FINDINGS OF FACT

#### I. THE ALLEGED UNFAIR LABOR PRACTICE

##### A. *The Evidence*

The Employer prepares, installs, and dismantles employers' trade shows, exhibitions, and convention sites in the States of California, Nevada, Washington, and Arizona. During a 3- or 4-week period in April and May 1990,[2] the Employer installed the Semicon trade show at the San Mateo Fairgrounds, located in the county of San Mateo, California. The Semicon trade show involved employers in the business of manufacturing, testing, and assembling computer products. It was scheduled to open for the public on May 22. The Employer was required to complete the installation of the show no later than May 20.

Respondent, whose geographical jurisdiction encompasses the county of San Mateo, California, is a labor organization whose members are employed as electricians. Respondent maintains a hiring hall to fulfill its contractual obligations to supply employers with electricians for jobs within Respondent's geographical jurisdiction.

The Employer, by virtue of membership in the National Electrical Contractors Association (NECA) or by having signed a letter of assent, during the time material was obligated to abide by the terms of a collective-bargaining agreement, known as the Inside Agreement, between Respondent and the San Mateo Chapter of NECA.

The Inside Agreement obligated the Employer to use the Respondent's hiring hall when it employed employees to perform electrical installation work in San Mateo County. The agreement, in this respect, provided, ''the [Respondent] shall be the sole and exclusive source of referrals of applicants for employment.'' The agreement also required Respondent to

[1] In its answer to the complaint Respondent admits that the Employer meets the Board's applicable discretionary jurisdictional standard and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, and that Respondent is a labor organization within the meaning of Sec. 2(5) of the Act. I therefore find it will effectuate the policies of the Act for the Board to assert its jurisdiction herein.

[2] All dates hereinafter, unless otherwise specified, refer to the year 1990.

register job applicants on out-of-work lists, and then refer the applicants on those lists on a first-in, first-out basis. If Respondent could not fill a job request within 48 hours, the requesting contractor had the right to find workers on its own. The agreement did not provide for any other relevant method of making referrals.

During the time material, Respondent's hiring hall dispatched applicants Monday through Friday at 8 a.m. The applicants that were registered on the hall's out-of-work lists had to be present at the hall to be dispatched.

Respondent requires an employer to notify Respondent of its request for applicants no later than 8 a.m. on the date for which the request is being made. The usual practice is for an employer to telephone Respondent's hiring hall during the Respondent's normal business hours (8 a.m. to 5 p.m.), the day before the employer wants the workers dispatched to the job. But, sometimes an employer phones its request after normal business hours, at which time the employer reaches a tape recorder which is activated each day during those hours Respondent is not open for business. The employers infrequently use this tape recorder to leave messages requesting that Respondent refer applicants to jobs. It is used by employers mainly to cancel previous requests for workers and when, during the evening, employers discover for the first time they need workers for the next day.

It is undisputed that prior to the time material herein, there were times when employers used the recorder to place orders for employees and the recorder failed to record the orders. As a result, it is also undisputed, Respondent's hiring hall dispatcher normally cautioned employers who used the recorder that it was not a reliable method for requesting referrals from the hall (Tr. 114, LL. 5–13).

John Lloyd, the Employer's electrical supervisor on the Semicon job, was responsible for hiring the workers who performed the electrical installation work. He testified he telephoned Respondent's hiring hall to request workers on approximately five different occasions during the approximately 3 or 4 weeks the Semicon job was in progress, and that on May 4, 17, and May 18, he phoned the hall during nonbusiness hours and left his requests on the Respondent's recorder. It was only on May 4 and May 17–18, when he used the recorder to request workers, that Lloyd testified he ever had problems having Respondent comply with his requests for workers.

Lloyd testified that on Friday, May 4, sometime after 5 p.m., he telephoned Respondent's hiring hall and left a message on the recorder requesting Respondent to dispatch two workers to the Semicon job on Monday, May 7. He testified when the two workers did not arrive at the jobsite by 9 a.m. on May 7, he telephoned Respondent's hiring hall dispatcher Donald Dean and told him he had left the above-message on the recorder, and further testified that Dean replied by stating he had played back the recorder and what was on the recorder was unintelligible, and explained to Lloyd Respondent had been having trouble with the recorder. Lloyd also testified that the result was that his May 4 request that two workers be dispatched to the jobsite on May 7 was not complied with and it was only after he renewed this request on May 7 that Respondent on May 8 dispatched the two workers to the jobsite.[3]

Louis Davoli, the Charging Party, testified that on May 7, while in Respondent's hiring hall, just before the 8 a.m. dispatch, he observed dispatcher Dean play back the recorder and heard Lloyd's voice on the recorder say, ''I'm putting in a call, short call, for one man at the Semicon show.'' Davoli also testified Dean played back Lloyd's message for Respondent's Business Manager Joseph Hogan and that Dean asked Hogan what he wanted him to do with the request, and Hogan answered ''they're playing games, we'll put it upon the board tomorrow.''

Neither Dean nor Hogan, who testified for Respondent, were questioned about Davoli's above-described testimony. Nonetheless, I reject it for these reasons: Davoli's testimonial demeanor—his tone of voice and the way he looked and acted while on the witness stand—was poor; Davoli's testimony was inconsistent with Lloyd's testimony that Lloyd left a message on the recorder for two, not one, workers to be dispatched; and, Davoli's testimony is implausible inasmuch as there is nothing whatsoever in the record to suggest why Hogan would have concluded that Lloyd was ''playing games'' with Respondent by using the recorder on May 4 to request Respondent to dispatch workers, or to suggest why Hogan on May 7 would be unhappy because of Lloyd's use of the recorder to request workers. Moreover, there is nothing whatsoever in the record which would suggest why, if in fact Respondent had received a recorded message that Lloyd wanted two men dispatched on May 7, it would not have promptly complied with that request, especially since the Respondent's dispatch records show that on May 7 it dispatched six workers to the Semicon jobsite pursuant to the Employer's request. There is nothing in the record to suggest why Respondent on May 7 would not have dispatched two more workers, if in fact by the time of the 8 a.m. dispatch it had received Lloyd's recorded message.

On May 16 the Employer laid off two of its electrical installers—Don Guabello and Richard Larson—because it thought their work performance had not been satisfactory.

On May 16, after being laid off, Guabello and Larson went to the Respondent's hiring hall and spoke to Paul Regnier, Respondent's assistant business representative and assistant dispatcher. They stated they believed the Employer had laid them off, but had not given them termination slips, and Guabello questioned why he had been terminated as he stated he thought he was a very good mechanic. They asked what Regnier could do about the matter? Regnier asked if they wanted to file a grievance, and they answered in the negative and indicated, in substance, they wanted him to determine why they had been laid off since they had not been given termination slips giving the reason for their layoff. They also informed Regnier they thought their layoff might have been a mistake (oversight).

Subsequently, Regnier went to the Semicon jobsite where he spoke to Lloyd about Guabello's and Larson's terminations. He asked why they had been terminated? Lloyd informed him, in substance, that their work had been unsatisfactory, so it had been decided to lay them off and they were not eligible for rehire. Regnier asked why, if they had been

[3] Dean, a witness for Respondent, was not questioned about the above-described May 7 conversation.

terminated, they had not been given termination slips. Lloyd replied the Employer did not have any termination slips, at which point Regnier made a note to bring some blank termination slips to the Employer. Regnier then asked to meet with the foreman who supervised Guabello's and Larson's work, and Lloyd introduced him to Foreman Bill Green, and left. Green showed Regnier the work Guabello and Larson had done and, in response to Regnier's inquiries, indicated that Larson had loafed on the job, whereas Guabello had tried to be productive. Regnier left Green and rejoined Lloyd. He asked Lloyd whether the Employer would consider rehiring Guabello and Larson? He pointed out to Lloyd that since Guabello and Larson had not been issued termination slips, they did not know whether they were fired, laid off, or eligible for rehire, that they just knew they were no longer employed by the Employer, and that Guabello felt he had been treated unfairly. Lloyd answered the Employer would not agree to rehire them and, when Regnier asked if the Employer would agree to rehire one of them, Lloyd answered in the negative, and this ended the conversation.

Immediately after his above-described conversations with Lloyd and Green about Guabello's and Larson's terminations, Regnier returned to Respondent's hiring hall, where he got 25 blank termination slips and, it is undisputed, returned later that same day to the jobsite where he gave the termination slips to Lloyd.

Lloyd and Regnier testified about Regnier's above-described visit to the jobsite concerning Guabello's and Larson's terminations. They did not contradict one another when they testified about what occurred on that occasion. The above description of what occurred on that occasion is based on a composite of their testimony. In dispute, however, is the date on which Regnier's visit took place. Regnier testified it took place on May 16, whereas Lloyd testified it took place during the afternoon of May 17.[4] I have not resolved this conflict because I believe its resolution would not effect the outcome of this case.

On May 17, at approximately 5:45 p.m., Lloyd telephoned Respondent's hiring hall and left a message on the recorder identifying himself and requesting that Respondent dispatch eight workers on a ''short call,'' referring to a job of 5 days or less, to the Employer at the Semicon job the next morning, May 18. The next morning, May 18, when Lloyd arrived at work he again telephoned the Respondent's hiring hall at approximately 7:15 a.m. and left the same message on the recorder that he had placed the previous night.

On May 18 there were between 6 and 10 out-of-work members of Respondent, including Davoli, present in the Respondent's hiring hall at 8 a.m. for that day's dispatch. Davoli was registered on the out-of-work list. Dean informed them there were no jobs available. Davoli asked where the ''calls'' were for the Semicon job? Dean answered, there had been no request for workers by the Employer for the Semicon job. Davoli told Dean he intended to go the Semicon jobsite to find out what was going on because earlier that morning someone had told him there was going to be ''calls'' for the Semicon job.[5] Dean repeated there had been no ''calls'' for that job.

On May 18, when the eight workers Lloyd had requested did not arrive at the jobsite by 9 a.m., he telephoned Respondent's hiring hall and asked the secretary who answered the telephone to speak to Dean. He was informed that neither Dean nor any of the other business representatives were present and that none of them were expected back until the afternoon. Lloyd stated he had placed a call for workers on the recorder and asked if the workers had been dispatched or if the secretary knew anything about the matter. The secretary replied she knew nothing about the matter.

Shortly thereafter, during the morning of May 18, Davoli visited the Semicon jobsite and was informed by Lloyd, among other things, that Lloyd in fact had placed a call with Respondent the night before for workers to be dispatched to the job that morning. Davoli then returned to Respondent's hiring hall and asked to speak to Dean, who was out of the office, so he confronted Regnier with what Lloyd had told him. Davoli was very upset and was yelling. He told Regnier, in substance, that the Employer had in fact placed a call with Respondent's hiring hall for workers to be dispatched to the Semicon job that morning. Regnier responded by stating, in substance, that to his knowledge the Employer had not placed such a call.

Immediately after his conversation with Davoli, Regnier left Respondent's hiring hall for a previously scheduled business appointment.[6] On his way to his appointment he telephoned the Employer's number at the Semicon jobsite and got no answer and later that morning at the conclusion of his appointment again unsuccessfully tried to reach someone at the Employer's jobsite phone number.

On May 18 Dean left Respondent's hiring hall at approximately 8:15 a.m. and did not return until the later part of the afternoon. Upon his return, he found messages on his desk stating that both Lloyd and Norm Yaharis, the Employer's vice-president of electrical services, had called. Dean at this time dialed the Employer's jobsite number and his call was answered by Yaharis. Dean asked if there was any problem? Yaharis stated, the Employer wanted workers and the Respondent had not sent it any. Dean stated that if the Employer was in a bind, Respondent could try to get the Employer some workers. Yaharis told Dean to go to ''hell'' and stated the Employer intended to ''take care of [Respondent's] jurisdiction the best way we can.''

Later that afternoon, not long after Dean's conversation with Yaharis, Regnier received a telephone call from one of Respondent's members employed by the Employer on the Semicon job, stating there were some workers doing electrical work for the Employer whom he did not recognize and asked if Respondent could send someone to the jobsite to investigate. Regnier immediately went to the jobsite, where he discovered three persons doing electrical work for the Employer who had not been referred to the job by Respondent and were members of Local 6, one of Respondent's sister

[4] The significance of the date is that on the morning of May 17 Respondent dispatched several workers to the Employer at the Semicon jobsite.

[5] Earlier that morning a friend of Davoli employed by the Employer on the Semicon job telephoned him and, according to Davoli's testimony, told him there were going to be ''five'' ''short calls'' for the Semicon job that morning.

[6] On May 18 Regnier was away from Respondent's hiring hall on several different occasions, starting at 7:45 a.m. and at various other times throughout the day, on a series of errands.

local unions. Regnier asked Lloyd what they were doing working on the job? Lloyd answered they were there because he had a job to run and explained he had requested Respondent to dispatch workers to the job for that day, but Respondent had not complied with his request. Regnier stated that to his knowledge there had been no request made by the Employer for Respondent to dispatch workers on May 18 to the job. Lloyd asked if Regnier could dispatch some people to the job and Regnier stated that if Lloyd wanted workers to be dispatched he would have to contact Respondent's hiring hall.

The unfair labor practice charge in this case was not filed by Davoli until November 9 and there is no evidence that prior to that date Respondent had any indication that either Davoli, or another hiring hall registrant, or the Employer intended to take action, legal or otherwise, against Respondent because of Respondent's failure to dispatch workers to the Employer on May 18.

On August 30 the Respondent's Business Manager, Joseph Hogan, sent to all of the employers, including the Employer, who were obligated to abide by the Inside Agreement, the following letter:

> Local Union 617 who is the source of referrals for employment in the San Mateo County Electrical Construction Industry has encountered some misunderstanding regarding requests for Electricians.
>
> To resolve any questions regarding this matter and eliminate any further controversy the following procedure will be followed. Employer requests for the referral of electricians are to be placed on the previous regular work day during the hours of *8:00 AM and 5:00 P.M.* Requests at other times placed on the tape recorder will not be considered.
>
> We are sorry for any inconvenience this may cause your firm but we feel a responsibility to insure the trust and integrity of the referral system and to eliminate any question of doubt regarding job opportunities real or imagined in the future.

Hogan testified that subsequent to May 18 various of the Employer's officials continued to indicate that they were upset over what had occurred on May 18 and, in effect, accused the Respondent of deliberately ignoring the Employer's request that workers be dispatched on May 18 to the Semicon job. Hogan testified these accusations disturbed him and to make sure that such a situation could never occur again he sent his August 30 letter to all the contractors covered by the Inside Agreement.

### B. *Discussion and Conclusions*

It is well established that, as the operator of an exclusive hiring hall, the Respondent owes a duty of fair representation to applicants using the hall. See *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989). As part of its duty of fair representation, the Respondent has an obligation to operate the exclusive hiring hall in a manner that is not arbitrary, or discriminatory, inasmuch as the Act prohibits a labor organization from adversely affecting the employment status of someone it represents for discriminatory, arbitrary or irrelevant reasons. *Miranda Fuel Co.*, 140 NLRB 181, 184–188 (1962).

The complaint herein alleges that Respondent's failure to refer applicants to the Employer on May 18, violated Section 8(b)(1)(A) and (2) of the Act because Respondent engaged in this conduct ''for arbitrary and capricious reasons.'' The theory of the complaint, as explained by counsel for the General Counsel at the start of the hearing, is that Respondent acted arbitrarily and capriciously on May 18, when it failed to refer applicants to the Employer because its failure to refer the applicants requested by the Employer was motivated by Respondent's animus toward the Employer for having terminated two of Respondent's employee members on May 16 and refusing Respondent's request that they be reinstated. I am of the opinion, as contended by Respondent, that Respondent's failure on May 18 to refer applicants to the Employer had nothing whatsoever to do with the Employer's termination and refusal to reinstate Respondent's employee members, but resulted solely from Respondent's failure to receive the Employer's request for the applicants due to a malfunction of the Respondent's telephone message recorder. It is for this reason that I shall recommend the complaint be dismissed.

The Employer's request that Respondent refer eight applicants to the Employer's Semicon job on May 18 was made in the form of a verbal message placed on Respondent's telephone message recorder. Paul Dean, Respondent's hiring hall dispatcher, testified he did not receive this message because Respondent's telephone message recorder had malfunctioned during the time period when the message was left. Dean also testified that the malfunction of the recorder caused Respondent to fail to receive one other message; a message from a contractor stating the contractor wanted a business representative to visit the contractor's jobsite on May 18. Dean impressed me demeanorwise as an honest and reliable witness.

I considered that when Dean came to work on May 18 and played back the telephone message recorder, he played back a message containing a request for applicants made by Lloyd, the Employer's electrical installation supervisor. I credit Dean's testimony that this message was a request for workers made by Lloyd on the evening of May 16 for the morning of May 17, which due to the subsequent malfunction of the recorder still remained on the recorder on May 18. I recognize Lloyd testified in effect that the only occasions on which he used the Respondent's telephone message recorder to request workers was on May 4, May 17 and May 18. I have credited Dean's testimony concerning this matter because Dean's testimonial demeanor—his tone of voice and the way he looked and acted while on the witness stand—was excellent. I am also convinced that just as Lloyd erred when he testified to the effect that Respondent failed to dispatch any applicants to the Semicon job on May 7,[7] that he likewise erred when he testified the only times he used the Respondent's telephone message recorder were on May 4 and May 17–18.

Dean's testimony that Respondent's hiring hall did not receive the Employer's May 17–18 messages for applicants to be referred to the Semicon job on May 18, because Respondent's telephone message recorder malfunctioned, is supported by the fact that Respondent's telephone message recorder had occasionally malfunctioned previously, resulting in Re-

[7] Respondent's dispatch records establish it dispatched six workers to the Employer's Semicon job on May 7.

spondent not receiving messages left by employers on the recorder during those periods. It is also supported by the fact that Dean had previously cautioned employers that the telephone message recorder was not a reliable method for requesting referrals.

As a matter of fact, on May 4, the Employer left a message on the recorder for Respondent to refer applicants to the Semicon job on May 7, which message Respondent failed to receive because the recorder malfunctioned, and when the Employer complained at that time about Respondent's failure to refer the requested applicants, Dean explained to Lloyd that the message recorder had malfunctioned and that Respondent had been having trouble with the recorder. In view of all of these circumstances, Dean's testimony that on May 17–18 the recorder once again malfunctioned is consistent with the probabilities of the situation.

It is for the foregoing reasons that I find Respondent established that the reason it failed to refer applicants to the Employer's Semicon job on May 18 was because it did not receive the Employer's request for applicants due to the malfunction of Respondent's telephone message recording machine. This constitutes a legitimate reason for Respondent's failure on May 18 to refer applicants to the Employer's Semicon job and is sufficient to overcome any inference that Respondent's failure to refer applicants to the Employer's Semicon job on May 18 constituted arbitrary or capricious conduct.[8]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

## ORDER

The complaint is dismissed in its entirety.

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[8] I am extremely doubtful whether there is sufficient evidence to make a prima facie showing that Respondent, as contended by the General Counsel, was angry at the Employer for terminating and refusing to reinstate two of the Respondent's employee members and that it was this animosity which was a motivating factor for Respondent's failure on May 18 to refer applicants to the Employer. As described in detail supra, there is no evidence—direct or circumstantial—which indicates Respondent was angry with the Employer for its termination of, and refusal to reinstate, two of Respondent's employee members. In any event, the Respondent established that it failed to refer applicants to the Employer's Semicon job on May 18 for a legitimate reason which had nothing whatsoever to do with the Employer's termination of, and refusal to reinstate, two of Respondent's employee members.

[9] If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.